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Nos. 299 and 329.

IN THE

Supreme Court of the United States

October Term—1942.

No. 299.

JERSEY CENTRAL POWER & LIGHT COMPANY,
Petitioner,

v.,

FEDERAL POWER COMMISSION,
Respondent.

No. 329.

NEW JERSEY POWER & LIGHT COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

REPLY BRIEF FOR PETITIONERS.

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JERSEY CENTRAL POWER & LIGHT COMPANY, Petitioner; v. FEDERAL POWER COMMISSION, Respondent.	No. 299.
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REPLY BRIEF FOR PETITIONERS.

This reply brief will employ the same designations of persons and statutes as the petitioners' original joint brief. The use of italics in quoted excerpts indicates emphasis supplied by petitioners.

I. Clarification of Facts.

Petitioners deem it essential to correct certain clearly erroneous inferences of fact made in respondent's brief.

A. Lack of Joint Motivation or Operation.

Respondent seeks to create the impression that the three companies, Jersey Central, Public Service and Staten Island, were, by design, participating in a joint operation having for its object the delivery to Staten Island of elec-

tric energy generated by Jersey Central. Nothing could be further from the facts. There is no substantial evidence, and in fact no evidence whatsoever, to support such a conclusion.

Respondent states that the bus bar at the Mechanic Street substation of Public Service "serves as the common point of connection for the three utilities" (Resp. Br., p. 6), and that the three companies are engaged in "interconnected pool operations" (Resp. Br., p. 11). In point of fact, the electric facilities of Jersey Central and Staten Island are not interconnected at any point, although each has a connection with the circuits of Public Service. Nor do Jersey Central and Staten Island have any dealings whatsoever with each other, the Court below finding explicitly that "There were no commercial transactions whatsoever between the Staten Island Company and Jersey Central" (R. 1133). Jersey Central does not sell any energy directly or indirectly to Staten Island, and does not transmit any energy to Public Service which is intended or destined for Staten Island (R. 293). In the electric business the term "interconnected pool operations" has a recognized significance (Cf. R. 174-178), and respondent could not have been so uninformed as inadvertently to have used the term improperly. The record is clear that neither Staten Island nor Jersey Central are in any sense parties to any pooling arrangement (R. 174, 293).

Respondent implies that the three companies are interdependent, by placing in juxtaposition the statements that Jersey Central had excess generating capacity (Resp. Br. p. 7, fn. 4) and that Staten Island is dependent on Public Service (Resp. Br. p. 8, fn. 6). Since the capacity of Public Service was amply sufficient to take care of its own needs and those of Staten Island without help from Jersey Central (R. 694-5), any implication that Jersey Central and Staten

Island are interdependent is clearly unjustified. A statement in respondent's brief that the connection of Public Service with Jersey Central was relied upon as making the Staten Island interconnection with Public Service more dependable (Resp. Br. p. 8) is utterly without justification. Staten Island did not rely on it (R. 363, 365). The connection between Staten Island and Public Service was in use long before the making of the Public Service-Jersey Central connection (R. 367, 273) and a Public Service official testified that they had no difficulty in meeting Staten Island's demands without reference to Jersey Central (R. 695). Furthermore, the Staten Island-Public Service connection is an emergency connection which is seldom used. (R. 349).*

Respondent's claim of "interdependence" among the three companies must be considered in the light of respondent's admission that Public Service had sufficient capacity to carry its loads; that Jersey Central also had sufficient capacity (Resp. Br. p. 7, fn. 4); and that Staten Island was able to meet its own load without the use of the cable connection with Public Service (Resp. Br. p. 8, fn. 6). In fact, the record shows that in 1937 Staten Island had 47,500 kilowatts capacity (R. 72, 368) compared to a peak demand of 31,700 kilowatts (R. 73), and that the cable was out of service

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* Basic data concerning this connection are: that the connection was used for emergency purposes only ten times, and for very brief periods, from August 26, 1935 to March 14, 1938; that on four such occasions the interruption was so short that no kilowatt hours were recorded; that from August 26, 1935 to April 30, 1937 the total economy energy taken by Staten Island from Public Service was about enough to run a 25 h.p. motor; and that no economy energy was taken from April 30, 1937 to March 14, 1938. (Respondent's Exhibit No. 3, R. 360, 1071-3; R. 349, 355-360, 525.) As to incidental or slop-over energy, during the period from August 26, 1935 to March 14, 1935, Staten Island actually returned more such energy to Public Service than it received. (Respondent's Exhibit No. 5, R. 481, 1075).

on several occasions, sometimes for as long as five days (R. 441-2).

Apparently for the same purpose respondent refers to certain testimony* to the effect that sudden demands by Staten Island on Public Service were instantaneously reflected in Jersey Central's generation (Resp. Br. p. 9, fn. 7). Such testimony is graphically controverted by New Jersey Power's Exhibit No. 8 (R. 1078½, 538), which shows that at 2:24 A. M. on August 13, 1936, when Staten Island suddenly made the largest draft on Public Service for emergency power during the entire period from the date of the enactment of the Federal Power Act to the date of the stock acquisition in question (R. 534), the flow of energy from Jersey Central to Public Service remained unaffected. This phenomenon, which is directly contrary to the picture presented in respondent's brief, is readily understandable in the light of expert engineering testimony in the record to the effect that the generating capacity of Public Service is so great (684,500 kilowatts, R. 97) that no demand capable of being made by Staten Island on Public Service through the cable, has any effect on the quantity of energy being generated by Jersey Central (R. 667).

Petitioners must call the attention of the Court to obvious, albeit presumably unintended, misrepresentation of vital fact at page 9 of respondent's brief where, immediately

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* Commission witness Bennett testified that a heavy Staten Island flow had an "effect" upon the flow of energy from Jersey Central to Public Service (R. 775). Pressed more closely, Mr. Bennett admitted that the "effect" which he spoke of lasted less than one-half minute and that the amount of energy flowing across to Staten Island was approximately 20 KWH (R. 841), which, even at residential rates, amounts to less than $1 in value. At the end of this very brief interval, *although the demand by Staten Island continued just as heavy upon Public Service*, the "effect" upon Jersey Central disappeared (R. 839; see Resp. Exh. No. 8, R. 1079, 539).

after showing in kilowatt hours the amount of energy passing between Public Service and Staten Island for the years 1934 to 1937, respondent makes the bald statement: "Log sheets maintained at Public Service's Mechanic Street substation show that energy *so transmitted* from Public Service to Staten Island is energy supplied by Jersey Central" (Resp. Br. pp. 9-10). Respondent thus asserts that every kilowatt hour of energy which flowed from Public Service to Staten Island was energy generated by Jersey Central. The log sheets at Mechanic Street certainly make no such showing. Even the respondent's engineers never made any such contention. Respondent blithely overlooks the fact that three Public Service substations are connected to the bus bar at Mechanic Street, and that an official of Public Service testified that that company can deliver from its own system, via its Metuchen substation, electric energy in an amount equal to *twice* the greatest possible load (including any demand by Staten Island) which might be put on Mechanic Street (R. 694-5).

As a matter of fact, respondent's engineers, despite their best efforts, could not prove what *quantity* of Jersey Central's energy ever found its way to Staten Island. Hence the statement by the Court below: "How much of the electricity which flowed from Public Service to the Staten Island Company originated in Jersey Central's South Amboy generators and passed over the connecting line from South Amboy to the Mechanic Street Substation and thence through the bus-bar to the Staten Island Company, *no one can say*" (R. 1121). All the Commission's evidence showing any flow from Jersey Central to Public Service contemporaneously with a flow from Public Service to Staten Island, is expressed in kilowatts and not kilowatt hours; in other words, no *duration* of flow is given. What is involved is nothing more than mere momentary pulsations having no commercial significance.

B. The Commission's Selection of Log Readings.

With respect to the analysis made by the Commission of the log readings at the Mechanic Street substation, the brief of respondent states (Resp. Br. p. 10) that such analysis was made of "24 of the 184 readings, picked at random as representing typical conditions * * *". We are astonished that the text of respondent's brief should be so phrased as to indicate, as does the passage just quoted, that the 184 readings were picked at random, when, as the record shows, they were deliberately selected by an experienced electrical engineer with a view toward proving a certain proposition (R. 266). Of the 25,500 readings available to this engineer 184 were carefully hand-picked; the only sampling was of the 24 which were "further analyzed", to produce Commission Exhibit 16A (R. 763, 1004). There is nothing to show that the 184 readings deliberately selected do not include *all* readings which tended in any way to support the Commission's case.

In a footnote respondent refers to the alleged "almost daily" transmission of electric energy, throughout 1936, 1937 and to September, 1938, from the generating plant of Jersey Central over its facilities and those of Public Service to Staten Island (Resp. Br. p. 19, fn. 9). The only authority cited in support of this assertion is the conclusion of the Commission in its Determination (R. 939), which, it is submitted, has no support in the record. Of the above-mentioned 25,500 readings, *none* occurred in *1936;* from the 184 selected readings there were shown to be 24 *moments of time* at which energy generated by Jersey Central is shown to have reached Staten Island. These 24 moments occurred on 8 days, only 4 of which were prior to March 14, 1938, the date of the stock acquisition which gave rise to this proceeding (Comm. Exh. No. 16A, R. 763, 1004). How

can respondent, on this flimsy showing, talk of "almost daily" transmission from Jersey Central to Staten Island?

C. Alleged "Reverse Flow" from Staten Island to Jersey Central.

Respondent seeks to support the judgments of the Court below by alleging that there was transmission of energy in interstate commerce from Staten Island to Public Service and thence to Jersey Central. As noted in petitioners' original brief (Pet. Br. p. 23, fn.), the Court below placed no reliance upon and did not even mention this contention. Doubtless the Court rejected the contention (which was also made below) for the reasons that:

(a) From the entire 25,500 log readings the Commission was able to refer to only one moment of time (on May 8, 1938) in which it could be said that *some part* of slop-over energy coming from Public Service to Jersey Central was generated by Staten Island. (See Pet. Br. 23, fn., and Comm. Exh. Nos. 18 and 18A, R. 130, 1009, 758, 1010; and R. 132).

(b) That single moment of time occurred *subsequent* to March 14, 1938, the date of the stock acquisition which gave rise to the present controversy.

(c) That instance must necessarily have involved not only slop-over energy as between Staten Island and Public Service, but between Public Service and Jersey Central as well. (R. 277 shows that such energy could not have been firm, emergency or economy flow power from Public Service to Jersey Central, and Staten Island supplied no firm, emergency or economy flow power to Public Service. R. 363, 421).

II. The Considerations Urged by Respondent Do Not Warrant the Conclusion that Jersey Central is a "Public Utility".

A. Jersey Central Does Not Transmit From a State.

Petitioners and respondent both agree that an essential question in this case is whether Jersey Central was engaged in the transmission of electric energy "from a State", within the terms of the Act. Respondent contends that transmission of electric energy is "an unbroken chain from the point where generation is complete" (Resp. Br. p. 21, fn. 11). For this proposition *Utah Power & Light Company* v. *Pfost*, 286 U. S. 165, is cited. Categorically and unequivocally, we contend that the *Pfost* case did not so hold.* Instead, *the major premise of the decision in that case is one of the premises on which our case is based*—to wit, that although from a strictly scientific standpoint the generation and various stages in the transmission and consumption of electric energy occur instantaneously, this Court, in applying established judicial criteria as to what constitutes interstate commerce, may and should divide such phenomena into those stages which, from a practical and functional standpoint, *are* separate.

The facts of the *Pfost* case were as follows: The State of Idaho levied a license tax on the manufacture, generation or production, within the state, for sale, of electrical energy. Utah Power & Light Company generated elec-

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* Nor does *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, aid the respondent. That case merely held that after transportation of gas across the state line had been effected, continued transportation by one forwarding it, with knowledge of its interstate character, to its originally intended destination, was interstate commerce. Such a holding is not in point in the present situation.

tricity at a hydro-electric plant in Idaho and transmitted it across state lines. It was taxed by the State of Idaho, and it protested. The question before the Court specifically was whether generation could be separated from transmission, so as to consider generation an intrastate activity. Such eminent scientists as Dr. Robert A. Millikan and Dr. Irving Langmuir testified for the company on the "instantaneous" movement of electricity from generator to transmission facilities. This Court wrote (p. 180):

> "However lacking it may be in body or substance, electrical energy, nevertheless, possesses many of the ordinary *tokens of materiality.*"

And (p. 180):

> "The manufacture to order of goods and their immediate shipment to the purchaser furnish a helpful analogy, notwithstanding the fact that there the successive steps from order to delivery are open to physical observation, while here *the succession of events is chiefly a matter of inference...*"

What are the "tokens of materiality" which the Court holds that electric energy has? They are the practical and functional attributes which, for the purpose of the application of legal concepts, electric energy is held to possess.

The present case sharpens the question in the *Pfost* case. There, generation was separated from transmission even though "the succession of events is chiefly a matter of inference." *A fortiori* in the present case, where the statute differentiates transmission in interstate commerce from transmission in intrastate commerce, the transmission of energy by Jersey Central is properly separable, on a practical, functional basis, from transmission of energy by Public Service, for reasons fully developed in our main brief (Pet. Br. pp. 37-39). Accordingly, Jersey Central

does not transmit electric energy "from a State", and is not subject to the Commission's jurisdiction.

B. The Interstate Commerce Cases Relied on by Respondent.

Petitioners have referred (Pet. Br. pp. 55-69) o the decided cases relating to the distinction between interstate and intrastate commerce in order to show what Congress intended by the expression "transmission of electric energy in interstate commerce" and similar expressions used in Section 201 of the Act. Petitioners contend that under these decisions a person can be held to transmit or transport a commodity or article in interstate commerce only upon a showing that the one so charged (a) has an intention that such commodity or article reach a second state; (b) has an ability to control the movement toward the intended destination; and (c) engages in sufficient activity, by means of his control and in furtherance of his intention, to effectuate the desired result without unreasonable delay. Respondent, on the other hand, contends that if there be an interstate movement without pause or rest, the mere participation of any person in such movement is sufficient to charge him with the consequences flowing from his innocent participation (Resp. Br. pp. 15, 31-33). Respondent also contends (merely "arguendo") that if it is necessary to show an intention on the part of Jersey Central to transmit energy to Staten Island, such intent is shown by the record (Resp. Br. p. 34 *et seq.*). Petitioners will answer these contentions of respondent *seriatim*.

(1) *The Necessity for "Interstate Intent".*

The language of the Court in *Oregon-Washington R. & Nav. Co.* v. *Strauss & Co.*, 73 Fed. (2nd) 912, cert. den., 294 U. S. 723, states in succinct fashion the views

repeatedly expressed by this Court in support of the contention of petitioners that, contrary to the first proposition advanced by respondent, "interstate intent" must exist on the part of a shipper or transmitter, if that person is to be charged with engaging in interstate commerce. The carrier in that case was unsuccessful in establishing that it was entitled to charge an interstate tariff, since it was unable to plead and prove that "Prior to the time that each shipment mentioned in this complaint left the interior point of origin, the defendant intended that such shipment would be transported into another state or to a foreign country; and that such shipment was in fact so transported". (73 Fed. (2nd) 912, 915)

Respondent seeks to meet the cases advanced by petitioners in support of this contention by erroneously asserting that such cases fall "into two general categories: (1) Where a commodity which had been transported interstate was thereafter locally distributed within a state, and (2) Where after intrastate movement and prior to movement out of state, a commodity had come to a complete rest within the state of origin . . ." (Resp. Br. p. 30). This classification is irrelevant upon petitioners' proposition that intent and control are essential elements in determining the character of the transportation or transmission. In addition, respondent's classification is erroneous. Petitioners cited, among other cases, *New York* v. *Knight*, 192 U. S. 21, *Southern Pacific Co.* v. *Arizona*, 249 U. S. 472, *New York Central Railroad* v. *Mohney*, 252 U. S. 152, *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, and *Department of Treasury* v. *Wood*, 313 U. S. 62, (Pet. Br. pp. 58, 61, 65, 60). The first three of these cases involved the transportation of persons who intended to leave the state on the journey of which the phase in question was a part. The latter two of these cases involved an intentional sending of commodities from the

state of origin "forthwith,"* as a part of the transaction in question, and with the knowledge of the person sought to be charged. In each case the lack of control over the movement was such that, despite the interstate intent, the proposed continuous movement was held not to have reached the interstate phase, and this despite the actual effectuation of the intent in the last two cases.

Respondent also seeks to meet the cases advanced by petitioners by citing (Resp. Br. p. 31) other decisions said to involve facts "more analogous" to the situation herein presented, in which a conclusion was reached that there was interstate commerce.

A. Of these "more analogous" cases, in the following intent was an element which the Court considered determinative of or material to the interstate character of the transportation or transmission:

> *Kelley* v. *Rhoads*, 188 U. S. 1. "The question turns upon the purpose . . ." (p. 7).
>
> *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498. ". . . the wharves were intended for shipping facilities, . . ." (p. 526); ". . . the shipments . . . were all destined for export" (p. 527).
>
> *Texas & N. O. R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111. The shipper "supposed . . . that the lumber was intended for export . . ." (p. 118).
>
> *Western Oil Refining Co.* v. *Lipscomb*, 244 U. S. 346. ". . . the shipper intended from the beginning that the transportation should be continued . . ." (p. 349).
>
> *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105. The original interstate character continued to "the point where the parties originally intended that the movement should finally end" (p. 113).

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* *Department of Treasury* v. *Wood*, 313 U. S. 62, 68.

United Fuel Gas Co. v. *Hallanan*, 257 U. S. 277. ". . . a steady flow, ending, as contemplated from the beginning, beyond the state line." (p. 281).

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282. ". . . the plaintiff intending to forward the grain to its mill as soon as the delivery was made" (p. 292).

Baltimore & O. S. W. R. R. Co. v. *Settle*, 260 U. S. 166, ". . . the original and continuing intention so to reship made the reshipment, as matter of law, part of a through interstate movement." (p. 168).

Champlain Realty Co. v. *Brattleboro*, 260 U. S. 366. "the mere fact that the owner intended . . . did not put them into transit in interstate commerce. But here, we have the intention put into accomplishment . . ." (p. 374).

Spalding & Bros. v. *Edwards*, 262 U. S. 66. "The transaction, from start to finish, was understood and intended . . . to be for the purpose of exporting the goods to . . . Venezuela." (p. 68).

Hughes Bros. Timber Co. v. *Minnesota*, 272 U. S. 469. ". . . the interstate passage . . . was intended by the parties and had begun." (p. 474).

United States v. *Erie R. R. Co.*, 280 U. S. 98, is comparable to all the above cited cases in that shipper and consignee intended the journey to continue to the ultimate destination.

Carson Petroleum Company v. *Vial*, 279 U. S. 95 quotes with approval excerpts from the *Hughes Bros. Timber Company* case, *supra*, with respect to intention and retention of control.

Respondent includes in this group of cases *Hartford Electric Light Company* v. *Federal Power Commission*, C. C. H. Public Utilities and Carriers Service, p. 17,936 (C. C. A. 2nd), decided November 25, 1942, after the brief of petitioners was filed. Respondent relies considerably on the case (Resp. Br., pp. 20, 22, 23, 25, 29, 31, 41, 43), despite

the fact that the specific question in the case was whether certain facilities were for the *sale* of electric energy at wholesale in interstate commerce.* Indeed the *Hartford* case supports the proposition that an "interstate intent" on the part of the seller is essential to a holding that a sale by him is in interstate commerce.† The Court refers to the palpable knowledge of Hartford that large quantities of energy sold by it were taken directly to a second state, and says:

> "We are not to be taken as saying that a mere sale by A, within a state, to B, who ships the commodity in interstate commerce, would necessarily be a sale in interstate commerce; *the character and extent of the seller's knowledge of the purpose of the purchaser to ship across state lines may be important.*" (p. 17, 940).‡

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* The *factual* situation in the *Hartford* case is in sharp contrast to that in the case at bar. In a nine-months period Hartford Electric Light Company sold Connecticut Power Company 166,144,000 kilowatt hours of electric energy, of which 97,932,000 kilowatt hours were transmitted by Connecticut Power Company to Massachusetts. (C. C. H. Public Utilities and Carriers Service, p. 17,936, 17,939.)

† "Because of petitioner's [Hartford's] former membership in the Exchange, because it has directors and officers interlocking with Connecticut Power and owns a sizable block of Connecticut Power's stock, petitioner cannot possibly lack knowledge of the fact that the sales by it to Connecticut Power are indispensable to those exchange arrangements which culminate in the transmission to, and sale of, considerable quantities of electric energy in Massachusetts. Indeed, the record shows that petitioner openly admitted that it has such knowledge. Petitioner, therefore, is fully aware that some of such energy is unavoidably destined by the buyer for interstate use." (C. C. H. Public Utilities and Carriers Service, p. 17,936, 17,941.)

‡ In support of the contrary proposition that for a transaction to be "in" interstate commerce, it is not necessary that the intention or knowledge fixing the out-of-state destination be that of the party first having custody or title, respondent relies upon *Texas & N. O. R. R. Co.* v. *Sabine*

The *Hartford* case is also significant for the emphasis which it places on the fact that Section 201(b) confers jurisdiction upon the Commission disjunctively over facilities for transmission *or* facilities for sale. Judge Learned Hand, in concurring in the result, placed particular stress on this point.

This emphasis suggests that the primary, if not the sole, purpose of Congress in including as a "public utility" a person owning or operating transmission facilities, as distinguished from facilities for sale, was to cover the situation in which the owner of transmission facilities is not engaged in the sale of any electric energy in interstate commerce, but makes such facilities available for carrying energy from a point in one state to a point in a second state. In practice, this would occur where A wishes to sell to C, in a second state, but has no connecting facilities, and B,

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Tram Co., 227 U. S. 111, 126; *United States* v. *Rock Royal Co-operative*, 307 U. S. 533, 568-569; *Mulford* v. *Smith*, 307 U. S. 38, 47; *Currin* v. *Wallace*, 306 U. S. 1, 10; and *Eureka Pipe Line Company* v. *Hallanan*, 257 U. S. 265, 272 (Resp. Br. pp. 36-37). In the *Sabine Tram* case, the party sought to be charged in fact supposed that the goods were intended for exportation and such belief was based on intimate knowledge of many facts surrounding the transaction. In the *Eureka Pipe Line* case, the Court definitely stated that the intent of the pipe line company, the one charged with the interstate business, was an interstate intent and determined the character of the movement from its beginning. In the *Rock Royal* case, and in *Mulford* v. *Smith* and *Currin* v. *Wallace*, the intent was found from the fact that the normal course of business established that "practically all" of the commodity handled was destined to points beyond the state in the usual course of business and that the party charged with engaging in interstate commerce was intimately familiar with that course of business. In other words, none of these cases support the contention that the intent or knowledge of the party participating in the original shipment or transmission is immaterial. In fact, they hold directly to the contrary.

for a charge, provides his facilities to transmit (or "toll") the energy from A to C. This interpretation is consonant with the following statement by Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, in the Senate Report on the revised bill:

> "Section 201 which sets forth the subject matter covered by part 2 of title II has been materially rewritten. A declaration of the necessity for Federal regulation of the interstate part of the electric business has been added as subsection (a). Subsection (b), formerly (a), which states the subject matter to which the part relates, has been clarified *to make plain* that it includes *interstate transmission where there is no sale* and excludes all facilities used only for production of [or] transmission in intrastate matters or in local distribution." (Senate Report No. 621, 74th Cong., 1st Sess., p. 19.)

Such an interpretation of Section 201(b) is amply supported by Section 206(a), where the Commission is empowered to determine the just and reasonable rate or charge "demanded, observed, charged or collected by any public utility for any transmission *or* sale *subject to the jurisdiction of the Commission*". In the case at bar, it is obvious that the price paid by Public Service to Jersey Central was a price for *energy*, not a rental or tolling charge for the *transmission* by Jersey Central of energy over seven-eighths of a mile of line. The absurdity in and difficulty created by respondent's position are demonstrated if one assumes Jersey Central to be subject to the jurisdiction of the Commission by virtue of its ownership of the seven-eighths of a mile of line from the South Amboy plant to the Raritan River, and then inquires as to the basis upon which the Commission would, under Section 206, seek to regulate the charge for the "transmission" in question.

B. In certain other cases cited by respondent as "more analogous", control of destination was the important factor, intention being obvious or admitted. Not unnaturally, most of the gas and oil transportation cases fall into this category, since oil or gas put into a pipe line system is obviously intended to travel in the pipe line until used or otherwise removed.

> *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265. "... the pipe line company ... was the master of the destination ... Therefore its intent and action determined the character of the movement from its beginning, ..." (p. 272);
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> *The Pipe Line Cases*, 234 U. S. 548;
>
> *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23.

Considerable reliance (Resp. Br. 31, 21, 27, 30, 32, 38) is placed by respondent on two natural gas cases, *Peoples Natural Gas Co.* v. *Federal Power Commission*, 127 Fed. (2nd) 153, cert. den., 316 U. S. 700, and *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498. Actually, these two cases accord with petitioner's contention that intent and control are essential elements in determining whether a given person is engaged in interstate commerce. The relation of parent and wholly-owned subsidiary in the *Illinois Natural Gas Co.* case evidenced both intent and effective control over the interstate movement of gas flowing from one company to the other. It is significant that the language of the Court was, "Pursuant to the mutual agreement of the two companies" the transportation was controlled and effectuated as intended (p. 503). In the *Peoples Natural Gas Co.* case, the seller and the purchaser were affiliates, and this fact, plus the immediate and continuous transportation of the gas into another state, demonstrated the clear intention of Peoples Natural Gas Co. to engage in interstate commerce.

These distinctions make it unnecessary to refer to the lack of any provision in the Natural Gas Act (52 Stat. 821, 15 U. S. C. A. §717) comparable to subsections (a) and (b) of Section 201 of the Federal Power Act.

C. The only remaining case cited by respondent as "more analogous" is a case where "the essential character" of the transaction was determined by "the normal contemplated and followed course" which evidenced, as a matter of law, the intent of the party charged therewith, viz., *Lemke* vs. *Farmers' Grain Co.*, 258 U. S. 50 There ". . . practically all the wheat purchased by the complainant was for shipment [out-of-state]. . . . That was the course of business and fixed and determined the interstate character . . ." (p. 55).*

(2) The Lack of "Interstate Intent" on the Part of Jersey Central.

"Assuming, arguendo, the necessity for the existence of an intent upon the part of Jersey Central when transmission starts, fixing the out-of-state destination," respondent states that "such intent is shown by the evidence in the record". (Resp. Br. p. 34).

At the outset respondent is confronted with the fact that *neither the Commission nor the Court below made any finding of such intent on the part of Jersey Central.* On the contrary, the ultimate facts upon which respondent relies are

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* *Flanagan v. Federal Coal Co.*, 267 U. S. 222, referred to by respondent (Resp. Br. p. 33), is a similar type of case. There the Court pointed out: "It was understood . . . that these dealings were steps in sending coal from the mines to purchasers in other states. . . . Flanagan [the vendor] understood the course of business in which he was expected to cooperate and did cooperate". (p. 225).

(1) the existence of two wholly separate, unrelated contracts;

(2) the fact that Jersey Central, Public Service and Staten Island operate in synchronism; and

(3) the alleged knowledge of the operators and officials of "the companies involved."

As to the first point, it is sufficient to point out that in 1931 Jersey Central and Public Service, without any consideration of Staten Island or its needs (R. 332), entered into a written contract for the supply of emergency energy by either to the other and some time later entered into a "verbal arrangement" for the interchange of economy flow. (R. 275, 276, 285). In 1936 a letter was written by Public Service to Staten Island, embodying an arrangement for the sale or exchange of emergency or economy flow energy, and there is not the slightest indication in the contract or in the record that such arrangement had any relation to Jersey Central or its needs (R. 349, 1068-9). There were no contractual or other arrangements whatsoever between Jersey Central and Staten Island.

As to synchronism, although synchronization is necessary if emergency energy is to be interchanged, this manner of operation is of no evidentiary significance on the question of the "interstate intent" of Jersey Central. This is true since: (a) "Electric power does not flow because machines are operated in synchronism" (R. 537); (b) there was no agreement or arrangement between Jersey Central and Staten Island to operate in synchronism; and (c) as shown immediately below, there is no showing that the officers or operators of Jersey Central knew or were concerned with whether its operation was in synchronism with that of Staten Island.

Finally, despite the lack of any such finding by the Commission or the Court below, respondent claims that "the evidence is that the operators and officials of the companies involved [presumably including Jersey Central] *knew* that the electric energy was bound to flow as it did" and "*did nothing to prevent such flow*". (Resp. Br. p. 35).

This is a gross distortion of fact. The record references cited by respondent do not refer to testimony by any operator or official of Staten Island, Public Service or Jersey Central. The testimony in question was given by a witness, who, *subsequent to* the initiation of the present proceeding, made an examination of the facilities at the Mechanic Street substation of Public Service (R. 712-3). It is amazing that respondent should impute to *Jersey Central* information which this witness, who had had no connection whatever with Jersey Central (R. 598), might have gleaned from his study of the operations of the Mechanic Street substation, or that respondent should rely on his testimony as showing that the operators and officials of any of the companies "did nothing to prevent" the flow of slop-over energy, in view of the fact that the witness did no more than express *his* opinion of what *he* knew. (R. 565). It is significant that respondent fails to refer to the testimony in the record by the actual operators of Jersey Central and Staten Island, to the effect that Jersey Central, in selling energy to Public Service, had no knowledge or intention that such energy would be used by anyone other than Public Service (R. 285, 290, 293); that Staten Island, when it received energy from Public Service, assumed that such energy was generated by Public Service itself (R. 363); and that elaborate measures were taken to prevent the flow of energy across the Staten Island-Public Service cable except at the rare times when an emergency existed (Pet. Br. pp. 16-19, R. 361-3, 409-411).

Respondent asserts (Resp. Br. p. 36) that Jersey Central had particular reasons and opportunity for familiarity with Public Service operations. On the contrary, the record references indicate that whatever knowledge Jersey Central had of Public Service operations related to the latter's cost of generating energy, and did not extend to the operations of Public Service in its transactions with Staten Island (R. 331-2). Mr. Crumley, President of Jersey Central, testified on cross examination, that Jersey Central does not know all the details of Public Service's load (R. 331); that Jersey Central does not know what Public Service's demand is on the entire Public Service system, and that in arriving at the arrangements between Public Service and Jersey Central no consideration was given to the arrangements between Public Service and Staten Island (R. 332). Without such knowledge it could not know that it might at 24 out of 25,500 moments of time, over a period of 21 months, generate energy which Staten Island would receive. The intention of Jersey Central was to transmit energy simply to the facilities of Public Service on the south bank of the Raritan River, within the State of New Jersey. At most, it had "indifferent knowledge"* as to what happened thereafter. It had no control over the future course of the energy.

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* This succinct and meaningful phrase was used by Mr. Justice Holmes in *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, 395. In *Hartford Electric Light Company* v. *Federal Power Commission*, C. C. H. Public Utilities and Carriers Service, p. 17,936 (C. C. A. 2nd, Nov. 25, 1942), the phrase was again used. Respondent attempts to distinguish *Superior Oil Co.* v. *Mississippi*, *supra*, on the ground that it was a tax case (Resp. Br. p. 33, fn. 20) However, as the Court is aware, tax cases are equally important with other types of cases in defining the concept of interstate commerce, and in fact a large percentage of the cases relied upon by respondent itself are tax cases.

III. Regardless of Jersey Central's Status, the Considerations Urged by Respondent Do Not Warrant the Conclusion that the Stock Transaction in Question Was Subject to the Jurisdiction of the Commission.

A. The Terms of Section 203(a) Do Not Compel the Conclusion that the Transaction was Subject to the Jurisdiction of the Commission.

In its brief, respondent urges that full cognizance may be given to the last clause of Section 201(a) by application of that portion of Section 203(a), which provides for the giving of notice to the Governor and the state commission of each of the states in which the physical property affected, or any part thereof, is situated.*

Petitioners submit that this provision for notice is intended to afford a means of advising the states involved so that (a) if their commissions have regulatory power they may assert the same, or (b) if their commissions do not have regulatory power (and, according to the Commission's own report [see Pet. Br., p. 80] there are twenty commissions which do not have such power over acquisitions of stock of a utility), representatives of the states involved may nevertheless consult with and be heard by the Commission with respect to their views on the matter. The notice provision is thus entirely consistent

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* The contention presented by petitioners, that the Commission has no jurisdiction over Jersey Central because the State of New Jersey exercises complete regulation of that company's affairs (Pet. Br., pp. 69-77), is not separately treated by respondent. However, respondent challenges the contention by discussing purported implications of certain sections of the Act (Resp. Br., pp. 25-28). The nature of these sections has been adequately discussed in petitioners' main brief (Pet. Br., pp. 72-74), except for Sections 203(a) and 209, which are considered under this Point III.

with the principal of exclusive state regulation of matters subject to state regulation and, in fact, affords a means of enabling state authorities to prevent an invasion of their jurisdiction.

To say that this provision "for administrative reconciliation of possible divergent views between the Commission and state regulatory agencies" (Resp. Br., p. 41) of itself limits Federal regulation "only to those matters which are not subject to regulation by the States" is to demonstrate the weakness of respondent's contention. Neither is such limitation recognized by possible reference, as respondent suggests (Resp. Br., p. 41), to a joint board (provided for in Section 209) on which state representatives may serve, since the granting of such a reference, revocable at will by the Commission, is entirely in its discretion.

B. Section 201(a) Compels the Conclusion that, if the Stock Transaction was Effectively Regulated by New Jersey, It Was Not Subject to the Jurisdiction of the Commission.

Despite respondent's own earlier reliance on Section 201(a) as *supporting* its jurisdiction (*Matter of Otter Tail Power Company*, 33 P. U. R. (N. S.) 257), respondent now dismisses that section lightly as not being of "positive" force (Resp. Br., p. 25). Section 201(a) is, of course, as much a part of the statute as Section 203. If there were the slightest doubt, despite the clarity and directness of the last clause of Section 201(a), whether that clause expressed the "policy of the legislation as a whole,"* it is resolved by reference to the nature of matters sought to be regulated, the assurances given state authorities at the time of passage of the Act, and the reasons for the regulation prescribed by the Act, as found in the statements of the Act's own sponsors.

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* *Cf. United States* v. *N. E. Rosenblum Trucking Lines, Inc.*, 315 U. S. 50, 55, cited in petitioners' brief, p. 71.

It is incontrovertible that the "matters" sought to be regulated were "interstate wholesale transactions" (the *Attleboro* "gap") and "other features of this interstate utility business * * * immune from State control either legally or practically" (Senate Report, No. 621, 74th Cong., 1st Sess., p. 17; and compare House Report No. 1318, 74th Cong., 1st Sess., p. 7, quoted at p. 54 of petitioners' brief). Equally specific is the Senate Committee's statement: "The revision [S. 2796, as distinguished from the original bill, S. 1725] has also removed every encroachment upon the authority of the States. The revised bill would impose Federal regulation only over those matters which cannot effectively be controlled by the States." (Senate Report No. 621, 74th Cong., 1st Sess., p. 18.) Cannot the State of New Jersey effectively control the acquisition by a utility company incorporated and operating entirely within New Jersey of securities of another utility company incorporated in and operating entirely within New Jersey? There would seem to be no argument on the point.*

Respondent, however, urges that to give effect to the last clause of Section 201(a) is to deprive Section 203 of its vitality, since petitioners' arguments, "if pressed to

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*Compare Section 3(a) of the Public Utility Holding Company Act of 1935, 49 Stat. 810, 15 U. S. C. A. Section 79c (Title I of the statute which included the Federal Power Act as Title II), providing for exemption from the principal provisions of the Act of holding company systems where a holding company and every subsidiary company thereof are predominantly intrastate in character or a holding company is predominantly a public utility company whose operations do not extend beyond a single state and states contiguous thereto. In Senate Report No. 621, 74th Cong. 1st Sess., p. 24, the Committee stated that companies of this class are "essentially not the kind of public utility holding companies at which the purposes of the legislation are directed" for the reason that "the whole system is intrastate."

their logical conclusion," would make petitioner Jersey Power completely immune from Commission regulation of stock acquisitions (Resp. Br. p. 27; p. 40 fn. 25). Even if respondent's conclusion were true, it would mean merely that the policy of Congress, in deliberately choosing to confer a much narrower jurisdiction on the Commission than the latter sought in the original draft of the Act, had brought about this result. Respondent's conclusion, however, is unwarranted. In the first place, even if the allegedly horrendous result of giving effect to Section 201 were to be that the Federal Power Commission would have no jurisdiction over any stock acquisition by petitioner New Jersey Power, Section 203 would still be applicable to the "public utilities" in at least 20 states which do not regulate such acquisitions. (See Pet. Br., p. 80). In the second place, if New Jersey Power were acquiring for cash the stock of a utility not operating in New Jersey (and this, petitioners submit, is the very type of acquisition with which Congress was concerned), the acquisition would not be subject to regulation by the New Jersey Board and would therefore be subject to the approval of the Commission.* This result would fully accord with the intent of Congress, which was that, by virtue of Section 203, the Commission "would have authority to keep the same kind of check upon the creation of spheres of influence among operating companies that the Securities and Exchange Commission has over holding companies under Title I" (Senate Report No. 621, 74th Cong., 1st Sess., 1935, p. 50). When the company whose stock is acquired owns and operates facilities which are in another state or which traverse state lines, then, and only then, is there a risk of the creation of the sort of

* N. J. S. A. 48:3-10 refers to acquisition of securities of a "public utility", as defined in N. J. S. A. 48:2-13, and such a utility would not fall within this definition.

"sphere of influence" which, because of the limited powers of the states, was of concern to Congress.

It might be urged that, despite state commission approval, a proposed acquisition of stock of one "public utility" by another "public utility" may give rise to a situation in which, by reason of the fact that the properties of one such utility are located in more than one state, or of both such utilities in different states, effective regulation of the acquisition, or of subsequent operations of the companies involved, may be difficult. From this it may be argued that in such a case the clear limitation prescribed in the last clause of Section 201(a) should be disregarded. Conceding, arguendo, that such might be the result, it is not our situation. Here both the acquiring company and the company whose stock is acquired are incorporated in the same state. Here the properties owned and operated by each company are located in the same state. Here the state in question, as was shown in our main brief and is further supported below, has complete regulatory powers, not merely over the acquisition but over the operations of both companies. Here a public utility commission of that state has exercised such powers. If this be not effective state regulation, what is?

C. The Nature of the Regulatory Powers of the New Jersey Board of Public Utility Commissioners, and the Exercise of That Power by the Board, are Such as to Exclude the Stock Transaction from the Jurisdiction of the Commission.

Respondent asserts that there is no conflict between the regulation of the stock transaction by the New Jersey Board of Public Utility Commissioners and that sought to be asserted by the Commission (Resp. Br., p. 44). Respondent supports this statement by claiming that, whereas

Section 203(a) forbids an unauthorized purchase, the New Jersey statute merely forbids an unauthorized sale (Resp. Br., p. 45). Such a position fails to give appropriate significance to the New Jersey statute (N. J. S. A. 48:3-10 (Pet. Br., App. A., p. A-30)), which provides, among other things, (a) that no public utility, as defined by New Jersey law, may make on its books any transfer of shares of its capital stock to any other public utility, and (b) that no public utility shall sell to another public utility any shares of its capital stock. It is true that that part of the statute paraphrased at (b) operates only upon the seller, but that part of the New Jersey statute paraphrased at (a) in effect operates upon both seller and purchaser, since it operates upon the corporation whose stock is the subject of the transaction. A transfer in violation of the statute is expressly made "void and of no effect" (*idem*). If the capital stock of a public utility cannot be transferred on the books of that company, no prospective purchaser will purchase. That this construction of the New Jersey statute accords with the views of the New Jersey Board, and possibly with those of the Commission itself, is indicated by the fact that in the booklet, *State Commission Jurisdiction and Regulation of Electric and Gas Utilities* (1941), in which data as to the scope of state regulation were collected by the Commission on the basis of information furnished by the state commissions, the New Jersey Board is shown (p. 19) to have the power to regulate "purchases of voting stock by other electric utilities."

Moreover, the assertions of respondent distort the nature of the order of the Board of Public Utility Commissioners (R. 5), in that the jurisdiction exercised by that Board in this case was founded not only upon N. J. S. A. 48:3-10, but also upon N. J. S. A. 48:3-7 (Pet. Br., App. A. p. A-25). This last section provides that no

public utility, as defined by New Jersey law, shall sell, lease or otherwise dispose of its property, without the approval of the Board. The transaction which was submitted to the Board for its approval, and which the Commission asserts was in violation of Section 203(a) of the Act, involved the acquisition by New Jersey Power from a non-utility of shares of capital stock of Jersey Central in exchange for certain property of New Jersey Power. Since the acquisition of the Jersey Central shares involved a disposition by New Jersey Power of its property, New Jersey Power itself was required to obtain the Board's approval of the transaction. The Board would not have given its approval to the disposition in the absence of its approval of the acquisition as well. In fact, it approved the "exchange" (R. 7). In doing so, it necessarily approved not only the transfer on the books of Jersey Central of the shares of capital stock involved, but also the acquisition of such stock by New Jersey Power.

D. The Position Urged by Respondent Rests Upon the Patently Unsound Premise that Jurisdiction of the Commission Over a Transaction is Dependent Upon Its Views of the Merits of Such Transaction.

Respondent suggests that "it may well be that if the question were properly presented to it, the Federal Power Commission would grant its approval of the acquisition," and that accordingly there is no conflict of jurisdiction (Resp. Br., p. 45). Petitioners submit that questions of jurisdiction are not to be resolved by speculation as to whether the tribunal whose jurisdiction is challenged will smile or frown upon a particular transaction.

Conclusion.

Respondent seeks to subject Jersey Central to federal regulation of its entire business because, in the course of generating millions of kilowatt hours for domestic consumption in the State of New Jersey, Jersey Central has generated a few wandering kilowatts (in an amount conceded by the Court below to be small) which apparently escaped to New York, as incidental or "slop-over" energy, over the lines of Public Service. On the facts of this case, it seems even questionable whether this involuntary ebb and flow of momentary electrical impulses over the emergency connection at the state line between Public Service and Staten Island could itself be dignified as "commerce".

Did Congress intend to subject a company such as Jersey Central to federal regulation as a public utility? If such be the effect of the law, then we have the startling result that Jersey Central, all of whose business is strictly intrastate and completely subject to regulation by the New Jersey Board, through no intent or act of its own, is held to be subject to the Commission's jurisdiction merely because Public Service has an emergency connection with a third company at a state line. If this be the law, then all the assurances given state authorities at the time of the passage of the Act were meaningless, and the resulting restrictive provisions inserted in the Act to protect state regulation of intrastate companies from possible conflict with federal regulation will prove abortive. If this be the law, no local intrastate electric company today can make an emergency connection or transmit *any* power to another electric utility, without running the risk of being transformed into an *interstate utility*, subject to the Act, *by transactions over which it has no control.*

Congress never contemplated that, merely because part of one company's network of transmission lines within a single state touches the state boundary, any other company touching that network at any point within the same state should be subject to the Act, if a few kilowatts of energy generated by it could be traced from that state to another state in a few isolated instances. Surely, such a construction is not within the avowed purpose of the Act, which, as Commissioner Seavey of the Federal Power Commission said, was to fill the gap which the *Attleboro* case left "in the present state regulation of electric utilities." What "gap" in regulation of Jersey Central is there, and what rates would the Commission be able to regulate, since Jersey Central's transactions are local transactions, since they all take place in New Jersey, and since its lines do not even run to the border of the state?

This Court has many times said that interstate commerce is not a technical legal concept, but a practical one fixed by practical lines and the established course of business. On the facts of this case, as to Jersey Central, there is no interstate commerce. There is no intent that energy move in interstate commerce. In the language of the cases "there must be the intent and the event". In this case the facts show affirmatively that there is neither.

Finally, whatever may be the status of Jersey Central, the specific transaction in question involves the purchase from a non-utility by a utility incorporated and operating entirely in the State of New Jersey of the stock of another such utility. It is a transaction carefully considered and approved by the New Jersey Board of Public Utility Commissioners, which has complete legal and effective control of both utility companies. One must search in vain to find legislative sanction or legislative policy for superimposing federal regulation upon the scrutiny already given this transaction under the laws of the State of New Jersey.

The judgments of the Court below should be reversed and set aside.

Respectfully submitted,

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